

IN THE SUPREME COURT OF THE STATE OF DELAWARE

CATHY D. BROOKS-
McCOLLUM,

Plaintiff Below-
Appellant,

v.

EMERALD RIDGE BOARD OF
DIRECTORS,

Defendants Below-
Appellees.

§
§ No. 104, 2011
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§ Court Below-Court of Chancery
§ of the State of Delaware
§ C.A. No. 147
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Submitted: September 23, 2011

Decided: October 5, 2011

Before **STEELE**, Chief Justice, **HOLLAND** and **BERGER**, Justices

ORDER

This 5th day of October 2011, upon consideration of the briefs of the parties and the record below, it appears to the Court that:

(1) The plaintiff-appellant, Cathy D. Brooks-McCollum, filed an appeal from the Court of Chancery's January 31, 2011 order granting the motion of the defendants-appellees, the Emerald Ridge Service Corporation Board of Directors (the "Board"), for judgment on the pleadings.¹ We find no merit to the appeal. Accordingly, we affirm.

¹ The President Judge of the Superior Court was designated to hear and determine all issues in this case pursuant to an Order dated May 3, 2005.

(2) Emerald Ridge Service Corporation (the “Service Corporation”) is a maintenance corporation that serves the Emerald Ridge housing development, located in Bear, Delaware. On January 2, 2004, Brooks-McCollum, then a property owner in the Emerald Ridge development and a member of the Board, filed what purported to be a derivative action on behalf of the Service Corporation against the Board in the Court of Chancery. On January 15, 2004, Brooks-McCollum resigned from the Board. Thereafter, the Board moved for judgment on the pleadings. In response, Brooks-McCollum filed a motion for advancement of expenses, which the Court of Chancery denied on July 29, 2004. This Court refused her interlocutory appeal from the Court of Chancery’s order.²

(3) Brooks-McCollum then filed a motion to remove her case to the United States District Court for the District of Delaware and filed a new complaint in that court. Ultimately, her motion was denied and the complaint was dismissed. The Third Circuit Court of Appeals affirmed the District Court. Thereafter, the United States Supreme Court denied Brooks-McCollum’s petition for a writ of certiorari. In the meantime, on October 5, 2005, Brooks-McCollum sold her property in the Emerald Ridge development. On March 17, 2006, the Board renewed its motion for

² *Brooks-McCollum v. Shareef et al.*, Del. Supr., No. 294, 2004, Holland, J. (Sept. 30, 2004).

judgment on the pleadings, which the Court of Chancery ultimately granted on January 31, 2011.

(4) In this appeal from the Court of Chancery's January 31, 2011 order, Brooks-McCollum makes numerous claims that may fairly be summarized as follows: a) the Board violated the Service Corporation's charter and by-laws and the Delaware Corporation Law, and that resulted in damage to the Service Corporation; b) she is entitled to the appointment of counsel to pursue her claims on behalf of the Service Corporation; c) she is entitled to indemnification for all actions taken on behalf of the Service Corporation; d) she has standing to maintain this derivative action despite having sold her property in the Emerald Ridge development; e) she was deprived of her right to a jury trial in the Superior Court on her defamation claim against the Board; f) in addition to defamation, the Board committed other acts against her personally, including improperly removing her as secretary and treasurer of the Service Corporation, failing to permit her to inspect the books and records of the Service Corporation and failing to reimburse her for certain expenses; g) the Board's attorneys should be disciplined for actions taken in this litigation; and h) State Farm Insurance Company should be added as a party to the derivative action because it defrauded the Service Corporation.

(5) Court of Chancery Rule 12(c) provides that the Court of Chancery will grant a motion for judgment on the pleadings when, viewing the claims in the light most favorable to the non-moving party, there are no material issues of fact and the movant is entitled to judgment as a matter of law.³ When considering a motion for judgment on the pleadings, the court must accept all well-pleaded allegations in the complaint as true, and assume that evidence would be presented to support those allegations.⁴ If matters outside the pleadings are presented to the court, the motion shall be treated as one for summary judgment pursuant to Rule 56. Under Rule 56(c), summary judgment will be granted if, viewing the evidence in the light most favorable to the non-moving party, there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.⁵

(6) The Court of Chancery's grant of a motion for judgment on the pleadings or a motion for summary judgment involves a question of law which this Court reviews *de novo*.⁶ In so doing, this Court applies the

³ *Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund II, L.P.*, 624 A.2d 1199, 1205 (Del. 1993).

⁴ *Id.*

⁵ *Judah v. Del. Trust Co.*, 378 A.2d 624, 632 (Del. 1977). The Court of Chancery applied the summary judgment standard in those instances where material outside the pleadings was considered.

⁶ *Cerberus Intern., Ltd. v. Apollo Mgmt., L.P.*, 794 A.2d 1141, 1153 (Del. 2002); *Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund II, L.P.*, 624 A.2d at 1204.

appropriate standard for judgment on the pleadings and/or summary judgment as well as the applicable substantive law.⁷

(7) In order to determine whether a lawsuit is derivative in nature, the Court of Chancery must determine the nature of the wrong as well as the party entitled to the relief requested.⁸ A derivative action is “one brought by a stockholder on behalf of the corporation” to obtain “relief in favor of the corporation and all similar stockholders so as to compensate the corporation for some wrong done to it as a whole.”⁹ A plaintiff who brings a derivative action on behalf of a corporation must remain a shareholder or member throughout the litigation.¹⁰ Once a plaintiff ceases to be a member or shareholder, he or she loses standing to maintain the lawsuit.¹¹

(8) It is undisputed that Brooks-McCollum sold the property she owned in the Emerald Ridge development on October 5, 2005. Consequently, as of that date, she ceased to be a member of the Service Corporation and lost her standing to pursue a derivative suit on behalf of the Service Corporation. As such, the Court of Chancery correctly determined that all the derivative claims purportedly made by Brooks-McCollum on behalf of the Service Corporation during the course of this litigation must be

⁷ *Cerberus Intern., Ltd. v. Apollo Mgmt., L.P.*, 794 A.2d at 1153.

⁸ *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1033 (Del. 2004).

⁹ *Reeves v. Transport Data Communications, Inc.*, 318 A.2d 147, 149 (Del. Ch. 1974).

¹⁰ *Lewis v. Ward*, 852 A.2d 896, 900-01 (Del. 2004).

¹¹ *Id.*

dismissed, including her claims of impropriety on the part of the Board and her claims of entitlement to counsel and to indemnification in connection with bringing those claims.

(9) The Court of Chancery also correctly determined that Brooks-McCollum's defamation claim, as well as her contention that she was deprived of her right to a jury trial on that claim, were without merit. The record reflects that Brooks-McCollum failed to preserve her right to a jury trial on her common law defamation claim in either her complaint or her amended complaint filed in the Court of Chancery in January and February 2004.¹² Even if Brooks-McCollum had properly preserved her right to a jury trial on that claim, and requested that claim to be transferred to the Superior Court for a jury trial, it would never have been presented to a Superior Court jury. As the Court of Chancery correctly determined, Brooks-McCollum's conclusory allegations against the Board failed to make out a *prima facie* case of defamation and, therefore, the claim would never have survived a pre-trial motion to dismiss in the Superior Court.¹³

¹² *Getty Refining and Marketing Co. v. Park Oil, Inc.*, 385 A.2d 147, 150-52 (Del. Ch. 1978), *aff'd* 407 A.2d 533 (Del. 1979); Del. Code Ann. tit. 10, §369. While Brooks-McCollum notified the Court of Chancery in March 2004 that she reserved her right to assert a claim of "advertising injury" under the Federal statutes in either the United States District Court or the Superior Court, there was no mention of her common law defamation claim.

¹³ *Spence v. Funk*, 396 A.2d 967, 971-72 (Del. 1978); *Spanish Tiles, Ltd. v. Hensey*, 2005 WL 3981740 (Del. Super. 2005) (a *prima facie* case of defamation requires these

(10) The Court of Chancery also correctly determined that Brooks-McCollum's non-derivative claims against the Board were meritless. It is undisputed that she was removed by the Board as secretary and treasurer. However, that action was within the authority of the Board under Section 8 of the Service Corporation's by-laws and was properly ratified by the Board on March 2, 2004. Moreover, when Brooks-McCollum sold her property in Emerald Ridge, she was no longer a member of the Service Corporation and, therefore, had no right to inspect its books and records.¹⁴ Finally, the record reflects that Brooks-McCollum never presented documentation to the Board supporting her demand for reimbursement of expenses, rendering that claim insufficient.

(11) Brooks-McCollum's last two claims regarding the Board's attorneys and State Farm do not appear to have been presented to the Court of Chancery in the first instance. At the very least, they were never fully adjudicated by the Court of Chancery. As such, we decline to consider the claims for the first time in this appeal.¹⁵ Because the Court of Chancery committed no legal error in granting the Board's motion for judgment on the

elements: a) the defamatory character of the communication; b) publication; c) reference to the plaintiff; d) understanding by third parties of the defamatory character of the communication; and e) injury).

¹⁴ Del. Code Ann. tit. 8, §220.

¹⁵ Supr. Ct. R. 8.

pleadings, we conclude that the judgment of the Court of Chancery must be affirmed.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Court of Chancery is AFFIRMED.

BY THE COURT:

/s/ Randy J. Holland
Justice